No. 79-296

In the Supreme Court of the United States

OCTOBER TERM, 1979

JACK EARL BARRENTINE, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the court of appeals is reported at 591 F.2d 1069.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1979. A petition for rehearing was denied on July 18, 1979. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari as to Walter Richard Smith, Jr., and

Barbara Singleton Smith to August 22, 1979, and on that date the petition was filed.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' Fifth Amendment right to due process or their Sixth Amendment right to the effective assistance of counsel was violated by the trial court's denial of their requests for continuances and by its appointment of counsel to represent them at trial when their retained attorney failed to appear on the appointed trial date (petitioners Walter Smith and Barbara Smith only).

2. Whether, in the absence of any prejudice, petitioners' convictions should be reversed because of the government's nonwilful failure to identify before trial an unindicted co-conspirator, as required by the district court's discovery order.

3. Whether alleged reliance on extra-record evidence and misreading of the record by the court of appeals warrants this Court's exercise of its supervisory power to review the decision.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioners Jack Earl Barrentine, Walter Richard Smith, Jr., Bobby Joe Lee, and Dean Rene Peters were convicted

[1] The petition for a writ of certiorari is accordingly out of time as to the other petitioners, pursuant to Rule 22(2) of the Rules of this Court.

and sentenced on three counts of conspiracy, operating an illegal gambling business, and interstate transportation of gambling paraphernalia, in violation of 18 U.S.C. 371, 1955, and 1953. Petitioners Barbara Smith, Lillie Belle Griggs, Pauline Crenshaw, Olin Whitaker, Jr., and Lucille Clark were each convicted and sentenced on two counts of conspiracy and operation of an illegal gambling business, in violation of 18 U.S.C. 371 and 1955.[2] The court of appeals affirmed (Pet. App. 1a-42a).

The evidence at trial, as set out in the opinion of the court of appeals (Pet. App. 36a-42a), showed that between July 1975 and June 1977 petitioners participated in a gambling conspiracy in communities near the border between Georgia and Alabama. The illicit operation was based on a lottery that derived its daily winning number from the newspaper listing of trading activity on the New York

[2] Petitioners' sentences are as follows:

Jack Earl Barrentine: two years' imprisonment, of which four months is to be served and the balance suspended in favor of three years' probation; Walter Smith: four years' imprisonment and cumulative fines totalling $30,000; Bobby Joe Lee: three years' imprisonment; Dean Rene Peters: 26 months' imprisonment; Barbara Smith: five years' probation under 18 U.S.C. 5010(a), the Federal Youth Corrections Act; Lillie Belle Griggs: one year and one day's imprisonment; Pauline Grenshaw: nine months' imprisonment; Olin Whitaker, Jr.: two years' imprisonment; and Lucille Clark: one year's imprisonment, of which six months is to be served and the balance suspended in favor of two years' probation.

Eight other co-defendants convicted at trial have not joined in this petition.

Stock Exchange (Tr. 63-65). A participant in the numbers operation, Charles Bland, testified for the government that petitioners Peters, Walter Smith (also known as "Bobby Smith") and Barbara Smith ran the operation, kept the records, received the money, and doled out the winnings (Tr. 45, 61-63, 69-70, 117). Petitioners Griggs, Clark, Crenshaw, and Whitaker, among others, wrote the bets, which were then picked up by Bland or by petitioners Lee or Peters (Tr. 48-49, 56). Telephone numbers given to the government by Bland were subscribed to by several co-defendants, including Pauline Crenshaw (Tr. 124, 142, 181-188).

Protracted surveillance by local and federal law enforcement officials substantiated Bland's testimony. These officers observed Peters, Smith, and Barrentine pick up brown paper sacks from various co-defendants and rendezvous at Smith's trailer (*e.g.*, Tr. 440, 474-476, 522-523, 543). Several photographs of petitioners and their cars were introduced at trial (Tr. 318, 327, 525). On July 16, 1977, acting pursuant to court-issued warrants, federal agents carried out a series of searches directed against automobiles belonging to petitioners Lee and Peters, numerous premises associated with the gambling operation, and petitioner Walter Smith. These searches resulted in the seizure of gambling records, papers bearing gambling-related notations, coin rolls, adding machines and tapes, and newspapers opened to the stock market reports (Tr. 830-832, 836, 842, 856-857, 870, 900-903, 916, 946, 960, 963, 980, 1046-1048, 1062,

1106). Petitioners Crenshaw and Lee, as well as other co-defendants, made statements following the searches revealing details of the conspiracy and admitting their participation in it (Tr. 884-885, 940, 1023, 1169). Finally, fingerprints found on some of the seized items matched those of petitioners Walter Smith, Lee, Peters, and Barrentine (Tr. 1077, 1081, 1083-1084).

ARGUMENT

1. Petitioners contend (Pet. 7-20) that they were denied due process and the right to the effective assistance of counsel in violation of the Fifth and Sixth Amendments, when the district court refused their attorney's repeated requests for a continuance and finally appointed an associate of their retained counsel to represent them at trial. Although petitioners raise this claim jointly, it is apparent that the contention relates only to the rights of Walter and Barbara Smith. Under the circumstances here, both courts below were correct in finding that these petitioners' rights were not violated.

a. On October 13, 1977, the Smiths' retained attorney, Edward Garland, was notified by the prosecutor that the trial was set for October 31, 1977. Garland immediately filed a motion for a continuance because the trial conflicted with another trial in which he was participating and because petitioners did not wish to be represented by an associate in his stead (R. 64-68).[3] The motion was denied on Oc-

[3] "R" refers to the consecutively paginated volumes of the record on appeal. "H. Tr." refers to the transcript of the

tober 18, 1977 (R. 206-207). On October 20, at a hearing on a variety of other pre-trial motions, Garland renewed his request for a continuance. At that time, and in the presence of petitioners, the district court explicitly and repeatedly denied the continuance request (H. Tr. 19, 24, 197-199). As justification for its decision, the court noted that its docket was full until Christmas and that a delay to that time would not be countenanced by the Speedy Trial Act (R. 206-207; H. Tr. 198). At the conclusion of the hearing, the court made certain that petitioners were aware that their trial would not be continued but would proceed as scheduled on October 31 (H. Tr. 200).

On the morning of trial, an associate of Garland presented himself before the court and announced that Garland was elsewhere representing another client and was unable to appear at that time (Tr. 6-7). The court refused to grant a continuance on account of Garland's absence. Instead, the court appointed Garland's associate, over his protestations that he was unprepared, to represent the Smiths (Tr. 7-8). The trial then proceeded as scheduled.

b. It is settled that "[t]he matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar* v. *Sarafite*, 376 U.S. 575, 589

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pre-trial motions hearing on October 20, 1979. "Tr." refers to the trial transcript.

(1964). Accord, *Nilva* v. *United States*, 352 U.S. 385, 395 (1957); *Avery* v. *Alabama*, 308 U.S. 444 (1940). Because of the impact that the requested delay would have on its tightly scheduled court calendar and on all of the defendants scheduled in the near future to appear before it, as well as the potential jeopardy to the speedy trial rights of petitioners' co-defendants, the trial court acted within its discretion in its October 18 order and October 20 reaffirmations of that order in refusing petitioners' request for continuance.

Nor was the trial court's denial of the final continuance request on the morning of trial, upon petitioners' counsel's failure to appear, an abuse of its discretion. As the court of appeals correctly noted (Pet. App. 15a), granting a continuance on the day of the trial would have delayed 16 co-defendants and their attorneys, all of whom were present and prepared to proceed, as well as the government prosecutors and their 47 witnesses. Moreover, it was because of petitioners' failure, during the 11 days after they were clearly informed of the firm trial date, to retain counsel who could appear for them, that the trial court was confronted on the day of trial with the decision whether to postpone the trial or to appoint Garland's associate and let the trial go forward.[4]

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[4] In fact, the Smiths were personally on notice nearly three weeks before commencement of their trial that the trial might start on a day on which their retained counsel would be occupied elsewhere. Petitioner Walter Smith signed an affi-

In the cases relied upon by petitioners (Pet. 9-14), the defendants had less than a week to retain counsel of their own choice, and in one of those cases—*United States* v. *McMann*, 386 F.2d 611, 619 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968)—the court indicated that it might have found a six-day period adequate time in which to retain trial counsel. A denial of due process was found only because the trial judge had initially indicated that only one day would be allowed, then granted three more days, and finally two more days, giving "no indication that the time he allowed might be extended beyond [each] firmly stated deadline." *Ibid.* In *Gandy* v. *Alabama*, 569 F.2d 1318 (5th Cir. 1978), on which petitioners principally rely, the defendant—as far as the record showed—had no more than one day's notice that his retained counsel had obligations elsewhere on the day set for his trial. Under the circumstances, the court of appeals found a constitutional violation in the trial judge's denial of a continuance, his failure to insist that retained counsel

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davit, dated October 12, 1979, in support of his attorney's first motion for a continuance (R. 67-68). Prudence surely dictated making some provisional arrangement or at least exploring alternatives in the event the continuance were denied. Petitioners suggested no reason—other than their insistence on retaining Garland for his conspiracy trial expertise—why they could not have asked Garland's associate Nuckolls to consult with Garland on their case and prepare himself to represent them. Nuckolls was obviously able to appear on the day set for trial, since he in fact represented the Smiths following his appointment by the trial judge, and he has since represented them in the court of appeals and in this Court.

represent the defendant as scheduled, and his appointment of the retained counsel's associate to represent the defendant. The court carefully noted, however, that *Gandy* was "not a case in which the defendant was afforded an ample opportunity to secure counsel of his choice and attempted to manipulate the court's schedule by * * * selection of an unavailable attorney" (569 F.2d at 1328). The same cannot be said of this case.

It is true, as petitioners state (Pet. 11-12), that the court of appeals in this case did not discuss all of the "factors" listed by the *Gandy* court (569 F.2d at 1324) as among those to be "considered" in deciding whether a denial of a continuance has deprived a defendant of his right to counsel of his choice. But the court did correctly distinguish *Gandy* on its facts (Pet. App. 16a-17a) and closely examined the circumstances leading up to the choice faced by the trial judge when Garland failed to appear on the day set for trial. Thus, the alleged conflict would not warrant review of this case even if—contrary to its customary practice—this Court were inclined to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

c. There is similarly no merit to the Smiths' related claim that the last-minute appointment of their retained counsel's associate, Nuckolls, to represent them at trial denied them effective assistance of counsel. Obviously Nuckolls was given only a very short time in which to prepare himself for trial through such means as consultations by telephone

with those who had been involved in trial preparation. But he, in fact, acquitted himself well, conducting diligent cross-examination of government witnesses (*e.g.* Tr. 74-77, 825-828, 839-840), highlighting weaknesses of their testimony in closing argument (Tr. 1274-1292), and examining witnesses in the defense of petitioner Walter Smith (Tr. 1188-1235). And Nuckolls had an opportunity during trial recesses, including a three-day weekend (Tr. 1154), to interview witnesses and consult with those familiar with the Smiths' case. See *United States* v. *Faulkner*, 538 F.2d 724, 730 (6th Cir.), cert denied, 429 U.S. 1023 (1976).[5] In addition, as the court of appeals noted (Pet. App. 16a), the co-defendants of Walter and Barbara Smith had a community of interests with the Smiths, and the Smiths benefited from the efforts of their co-defendants' attorneys, who "were prepared and vigorously attacked the government's case."

Petitioner Walter Smith's complaint to the trial judge (Tr. 1151-1152), cited by petitioners (Pet. 16-17), that Nuckolls, his appointed counsel, would not call witnesses to support a defense Smith had to the charges because Nuckolls had not interviewed any of those witnesses, adds nothing to his ineffective assistance claim; for Nuckolls did in fact call and

[5] This case is thus unlike *United States* v. *Miller*, 508 F.2d 444 (7th Cir. 1974), in which the defendant, for whom counsel was appointed one day before trial, had apparently not previously been represented by counsel in connection with the case, so that no pre-trial preparation by anyone could have been done.

carefully examine witnesses (Tr. 1188-1197, 1211-1214, 1222-1226, 1233-1235) in support of the only defense described by Walter Smith (Tr. 1152)—that he had been often in court or otherwise under the eyes of a policeman for three or four months of the period during which he was accused of running the numbers operation.

In any event, if there were any deficiencies at all in the Smiths' defense as a result of their representation by counsel appointed just before trial, they themselves are responsible; for as shown above, they and their retained attorney simply "gambled [and] lost" in their "calculated attempt to force a continuance notwithstanding their knowledge of the trial judge's strongly voiced contrary ruling" (Pet. App. 17a).

2. Petitioners also contend (Pet. 25-28) that their convictions should be reversed because of the prosecutor's failure to produce the name of one unindicted co-conspirator, as the trial court had ordered in its ruling on a defense motion for a bill of particulars. This contention is without merit because petitioners have shown no prejudice.

a. Prior to trial, petitioners filed a motion for a bill of particulars requesting the names of all known unindicted co-conspirators (R. 130-134). In a motion for discovery under Fed. R. Crim. P. 16, petitioners sought discovery of, among other things, Charles Bland's address, his past and pending criminal charges and activities, and all arrangements between Bland and the government. The government

declined, in whole or in part, to answer questions concerning Bland, but it did not deny that Bland would appear as a witness (R. 217-218). Rather it expressly "decline[d] to state whether or not Dusty Bland" would be a witness at the trial (R. 218, No. 26) but stated that if Bland "should have information of value to the United States," he would be called and defendants could cross-examine him (R. 218, No. 29). At a pre-trial hearing on October 20, the trial court denied petitioners' discovery requests respecting information about Bland that the government had declined to furnish (Pet. App. 24a-27a n. 8), but it ordered the prosecutor to reveal the names of any co-conspirators (H. Tr. 95-96). The prosecutor denied knowing of anyone whom he considered a co-conspirator other than those already identified (*ibid.*).

On the morning of trial the government provided petitioners with a witness list that included Bland. They then moved to suppress Bland's prospective testimony on the ground that he was an unindicted co-conspirator whom the government had failed to identify as ordered. The government responded that Bland was not an unindicted co-conspirator because he had withdrawn from the conspiracy before the date of the indictment (Tr. 13-27).

b. Although both courts below rejected the prosecutor's theory that Bland was not a co-conspirator, each found that the government's withholding of his name had not prejudiced petitioners. Petitioners obviously expected Bland to testify for the government,

and the government's refusal to deny that he would be called as a witness put them on notice that their suspicions were reasonable. Thus they cannot claim that the failure to identify him as a co-conspirator denied them the opportunity to investigate him prior to trial.[6] Nor were petitioners denied any information necessary to examine or impeach Bland at trial. Indeed, as the court of appeals noted (Pet. App. 30a):

> The transcript of Bland's cross-examination by four defense attorneys consists of forty pages. Their questioning was vigorous and extensive. They tested Bland's direct testimony for weaknesses, attempted to impeach him and attempted to show his bias. They specifically probed whether he had made any deals in connection with his testimony. If more could have been accomplished on cross-examination, it has not been suggested to us.

Moreover, petitioners' guilt was overwhelmingly proved at trial by the surveillance testimony, the

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[6] For this reason, *United States* v. *Opager*, 589 F.2d 799 (5th Cir. 1979), on which petitioners principally rely, is inapt. In *Opager* the court found that the prosecutor's refusal to disclose the address of an informant had deprived the defense of any opportunity to seek an interview with him before trial. *Opager* also involved repeated and knowing refusals by the prosecutor to comply with the court's order; here, the prosecutor's failure to identify Bland as an unindicted co-conspirator was based on an erroneous reading of the law but was not shown to be willful disobedience of the court's order. In any event, as noted (page 9 *supra*), any inconsistency between *Opager* and the decision here would be an intra-circuit conflict not meriting review by this Court.

seized evidence, the fingerprint evidence, and admissions.

In light of these considerations, pre-trial knowledge that Bland was known to be an unindicted co-conspirator could not have materially affected the outcome of the trial. The government's failure to inform petitioners thus did not result in an unfair trial requiring reversal, and the district court did not abuse its discretion in denying the remedy sought by petitioners. *United States* v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976); *United States* v. *Marrero*, 516 F.2d 12 (7th Cir.), cert. denied, 423 U.S. 862 (1975). Cf. *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977).

3. Finally, petitioners (Pet. 23-25) ask this Court, in the exercise of its supervisory power, to review the propriety of statements in the court of appeals' opinion allegedly based on matters outside the record.[7] This contention is insubstantial in view of the fact that nearly all of the statements cited by petitioners as based on extra-record evidence may reasonably be inferred from the record of proceedings in the trial court.

In one paragraph that petitioners characterize (Pet. 23) as having no basis in the record, the court of appeals observed (Pet. App. 10a) that petitioners

[7] Petitioners' request for relief with respect to this issue is not well defined. Their reference to a reversal of their "appeal" (Pet. 21) suggests that they seek to have the decision of the court of appeals vacated and the case remanded for a new appellate decision.

Walter and Barbara Smith must have been aware, on June 16, 1977, that they were being investigated for gambling violations and that an indictment was not unlikely. This is plainly a reasonable inference from the fact that search warrants based on allegations of gambling violations were executed on June 16, 1977, against the person of Walter Smith and against the Smiths' residence in the presence of Barbara Smith (Tr. 251, 822-824, 959). The court's observation (Pet. App. 10a) that the Smiths were soon thereafter represented by Frank Martin, Walter Smith's "usual attorney," is supported by testimony of a county sheriff to whom the Smiths gave information implicating Charles Bland in criminal activity (Tr. 205-207) and by colloquy between counsel during the trial (Tr. 1175-1177). While such representations by counsel could not properly be considered with respect to matters of fact determined by the jury, they clearly could be noticed with regard to the Sixth Amendment claim of the Smiths, who suggested (R. 67) and who still suggest (Pet. 11) that they had no occasion to seek out counsel regarding possible gambling charges until the indictment came down in September 1977. Clearly petitioners do not consider the representations of counsel that they cite (see, *e.g.*, Pet. 5) to be extra-record evidence that a court may not properly rely on.

The one isolated reference in the opinion to something that does in fact appear to be outside the record—the allusion to a conversation in which the United States Attorney advised Frank Martin in

July that the government would seek an indictment against petitioner Walter Smith—is based on a letter from Martin to an Assistant United States Attorney appended to the government's appellate brief and is hardly cause for this Court's exercise of its supervisory powers over the lower courts.

Other statements cited by petitioners in their argument of this issue (Pet. 23-24) in fact have nothing to do with reliance on extra-record evidence but represent alleged errors in the court of appeals' reading of the record. Of those statements, two are not in fact erroneous,[8] and the other two are misreadings on matters that were not critical to any of the court's holdings.[9] In any event, neither reason nor

[8] The record (R. 67-68) plainly shows that the Smiths knew on October 12, 1977, that the trial was set for October 31. Contrary to petitioners' suggestion (Pet. 23) the court of appeals (Pet. App. 11a) did not state that the Smiths were formally notified on that date of the trial court's ruling on their motion for a continuance. Similarly, the court of appeals' statement (Pet. App. 15a) that all the defendants except the Smiths were ready to proceed when the case was called is correct, since none expressed any lack of readiness until it became clear that Charles Bland would be called by the government (Tr. 4-6, 13-14); and in the court's view (Pet. App. 27a-30a), the request made by all defense counsel for a continuance to investigate Bland was adequately dealt with by the trial judge when he continued the trial until 1:30 p.m. that day and directed the government to reveal to defense counsel its information concerning Bland's arrest record.

[9] The court of appeals (Pet. App. 22a) incorrectly assumed that a case cited in the opening brief of appellants other than the Smiths had been cited in a reply brief allegedly filed by the Smiths (*ibid.*). It also (Pet. App. 13a n.7 and 27a-29a n.9) attributed to the Smiths' appointed attorney Nuckolls some remarks made by another attorney, which indicated familiarity with many facts of the case. Since, as we have shown (pages 5-11 *supra*), the court of appeals' rejection of the Smiths' Fifth and Sixth Amendment claims is plainly sustainable without reliance on these remarks, this error is inconsequential.

precedent supports an invocation of this Court's supervisory power to review an appellate court's allegedly erroneous readings of the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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